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No. 80-2203

In the Supreme Court of the United States

OCTOBER TERM, 1981

CLIFFORD Y. PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether denial of a motion for new trial, which was based upon a juror's testimony that comments suggesting bias were made by another juror during deliberations, was an abuse of discretion.

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3 *Weinstein's Evidence* (1977) 5, 6

Much of that shipment was discovered in Stein's apartment by officers who arrested him (A. 494-497, 499, 501).

2. The jury began its deliberation on a Friday evening. After approximately two hours, the court postponed further deliberations. On the following Monday, the jury resumed deliberation at 9:15 a.m., and returned a verdict at 4:55 p.m. (A. 558-565). Each juror, including Judith Hendrix, was polled. When asked by the court, "[I]s this your individual and considered and deliberate verdict?" Hendrix replied affirmatively (A. 565).

A few days later Hendrix telephoned the trial judge and claimed that certain improprieties had occurred during jury deliberations. The court notified the parties; immediately prior to sentencing they met with Hendrix in chambers to deal with her allegations. At the outset of the hearing, the judge noted that although Hendrix's testimony was probably inadmissible under Fed. R. Evid. 606(b), he would permit a record of her contentions to be made (A. 566-567; Pet. App. 9a).

Apparently a lone holdout for acquittal during much of the deliberations, Hendrix recounted a number of arguments with the other jurors. During the deliberations Hendrix told the other jurors that she believed petitioner's claim that Stein had used aliases in Louisville to avoid problems that might arise because he was Jewish. According to Hendrix, the foreman responded that the defense attorney also was Jewish, and that "they" could convince anybody of anything, just as the lawyer had convinced Hendrix (Pet. App. 20a-21a). Hendrix indicated that she was uncertain of the meaning of that comment, but "felt that he meant it personally" (*ibid.*). She added that the other jurors seemed to agree with everything said by the foreman (Pet. App. 21a). Hendrix also stated that while she had not suffered any physical force (Pet. App. 17a), her eventual decision to

support the guilty verdict may have been prompted by her head cold, coupled with the cigarette smoke and warm temperature in the jury room (Pet. App. 23a-24a).

Following this testimony and a discussion with counsel, the court remarked that Hendrix's testimony provided no basis for a new trial and reiterated that the testimony had been adduced for the benefit of appellate review (Pet. App. 25a-32a). Noting that the remark purportedly uttered by the foreman could be construed as an expression of admiration, the court also disagreed with defense counsel's argument that the remark conclusively demonstrated religious prejudice on the part of the foreman (Pet. App. 29a). The court of appeals affirmed the convictions (Pet. App. 1a-3a).

ARGUMENT

Fed. R. Evid. 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The rule is a codification of well-settled case law; its purposes are to discourage harassment of jurors by a losing party, to encourage free and open discussion during deliberations, to reduce incentives for jury tampering, to promote the finality of verdicts, and to maintain the viability of

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is noted at 652 F. 2d 60.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1981. A petition for rehearing was denied on April 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of using a wire communication to facilitate the commission of a felony (counts 1-7), possession of cocaine with intent to distribute it (counts 10-12), and distribution of cocaine to a person less than 21 years of age (counts 13-14), in violation of 21 U.S.C. 843(b), 841(a)(1), and 845. He was sentenced to

imprisonment for concurrent terms of four years on counts 1-7, and 15 years on counts 10-14, subject to the immediate parole provisions of 18 U.S.C. 4205(b). In addition, the court imposed concurrent six-year special parole terms on counts 10-14.

1. The evidence at trial showed that petitioner was involved with Alan Stein in a business venture involving the purchase of gold jewelry for resale by Stein in Louisville, Kentucky (A. 454-455).[1] When Stein traveled to Louisville with the jewelry, he frequently carried cocaine as well. Stein became a distributor of cocaine in the Louisville area; some of the individuals who shared or distributed Stein's cocaine were teenage girls (A. 261-266, 270-278). After Stein lost his cocaine source, petitioner helped him acquire a new one.

In mid-1977, Stein moved from Miami Beach, Florida, to Louisville. Thereafter, petitioner delivered cocaine to Stein personally or by way of an airplane express cargo delivery service (A. 482-495). When sending the cocaine by air, petitioner used a special envelope provided by a computer tax service company. The packages sent to Stein ostensibly contained documents; they actually contained manila envelopes within which cocaine had been hidden (A. 483). Each package was addressed to one of the aliases used by Stein and contained between one-quarter ounce and two ounces of cocaine (A. 487). Stein sent payments for the cocaine to petitioner by wire (A. 489-490).

The final cocaine shipments to Stein occurred early in May, 1978. Anticipating increased demand for the drugs during the weekend of the Kentucky Derby, Stein sent petitioner money orders amounting to $1,600, enough for an ounce of cocaine. On May 6, 1978, petitioner sent Stein a package of cocaine via airplane express delivery service.

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[1] "A." refers to the two-volume Appendix filed in the court of appeals.

the jury as a decision-making body. See *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915); *United States* v. *Marques*, 600 F. 2d 742 (9th Cir.), cert. denied, 444 U.S. 858 (1979); *United States* v. *Green*, 523 F. 2d 229 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976); *Government of Virgin Islands* v. *Gereau*, 523 F. 2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976); *United States* v. *Schroeder*, 433 F. 2d 846 (8th Cir. 1970), cert. denied, 400 U.S. 1024 (1971); *United States* v. *Chereton*, 309 F. 2d 197 (6th Cir. 1962), cert. denied, 372 U.S. 936 (1963); *United States* v. *Furlong*, 194 F. 2d 1 (7th Cir.), cert. denied, 343 U.S. 950 (1952); *Rakes* v. *United States*, 169 F. 2d 739 (4th Cir.), cert. denied, 335 U.S. 826 (1948); *Johnson* v. *Hunter*, 144 F. 2d 565 (10th Cir. 1944). There are conflicting considerations, but they do not outweigh the public policies that support the rule prohibiting jurors from impeaching their own verdicts by disclosures of events occurring during deliberations. *McDonald* v. *Pless, supra*; see also *United States* v. *Dioguardi*, 492 F. 2d 70, 79-80 (2d Cir. 1974); *Gault* v. *Poor Sisters of St. Frances*, 375 F. 2d 539 (6th Cir. 1967); *United States* v. *Kafes*, 214 F. 2d 887 (3d Cir.), cert. denied, 348 U.S. 887 (1954).

1. Recognizing the applicability of Rule 606(b), petitioner argues that Hendrix's testimony is within the exception that permits a juror to reveal the presence of "extraneous prejudicial information." The offhand comment alleged to have been uttered by the jury foreman regarding his impression of how defense counsel's supposed ethnic background enhanced his persuasiveness is not within the exception mentioned in Rule 606(b). The "extraneous information" exception includes evidence of the jury's consideration of evidence not admitted in court, such as information gained by visits by a juror to places mentioned in the testimony, or outside publicity. See generally 3 *Weinstein's Evidence* 606-31 to 606-34 (1977); see also *id.* at

606-13 to 606-16. It does not permit consideration of a juror's post-verdict report of speculation uttered by another juror during deliberations. See, *e.g.*, *Government of Virgin Islands* v. *Gereau, supra*, 523 F. 2d at 149-151; *Smith* v. *Brewer*, 444 F. Supp. 482 (S.D. Iowa), aff'd, 577 F. 2d 466 (8th Cir.), cert. denied, 439 U.S. 967 (1978); 3 *Weinstein's Evidence, supra*, at 606-35 to 606-36.[2]

2. Petitioner also claims that the testimony of juror Hendrix indicated religious bias on the part of the jury foreman, and, therefore, was admissible to support his claim that due process was violated by the foreman's concealment of his bigotry during the voir dire. We do not dispute petitioner's right to an unbiased jury. Nevertheless, an isolated remark by a juror during the give and take of heated discussion over guilt or innocence is not evidence of bias sufficient to justify discarding the secrecy of jury deliberations. Cf. *Clark* v. *United States*, 289 U.S. 1, 15 (1933). Fed. R. Evid. 606(b) strikes a balance between the interests furthered by litigating claims of juror bias based upon such utterances and the public policies implicated by the rule barring disclosure of statements of jurors during deliberations. See also *McDonald* v. *Pless, supra*, 238 U.S. at 268.[3]

Petitioner's reliance upon *United States* v. *Bynum*, 634 F. 2d 768 (4th Cir. 1980), is misplaced. In *Bynum* the court discovered, without inquiry concerning the jury's deliberations, that a juror had failed to disclose the criminal record

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[2]Defense counsel's religion or ethnic origin was never discussed at trial. Since there is no reason to believe that the jurors, residents of Kentucky, knew defense counsel, who is from Miami, Florida, we assume—as does petitioner—that the basis for the comment allegedly made by the jury foreman was his own surmise.

[3]The impropriety of petitioner's reliance upon the foreman's remark to support the claim of bias is underscored by the view of the district court judge, who was not convinced that the remark reflected bigotry.

of a close relative. The Fourth Circuit's holding that the juror's deliberate concealment deprived the defendant of his right to a fair trial therefore is not inconsistent with the holding in this case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Further, petitioner does not suggest that any juror assumed that he was Jewish. Any bias reflected in the alleged remark presumably affected the foreman's evaluation of Stein's testimony as well as the evaluation of defense counsel's arguments. Finally, it is impossible to estimate the significance of the remark, and it is precisely this sort of speculation that Rule 606(b) was intended to preclude.

[4]Similarly, neither *Photostat Corp.* v. *Ball*, 338 F. 2d 783 (10th Cir. 1964) nor *Ryan* v. *United States*, 191 F. 2d 779 (D.C. Cir. 1951), cert. denied, 342 U.S. 928 (1952), involved any inquiry concerning the jury's deliberations.

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